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Supreme Court of the United States

OCTOBER TERM, ~~1949~~ 1950

No. [REDACTED] 7

NATIONAL COUNCIL OF AMERICAN-SOVIET FRIENDSHIP, INC.,
DENVER COUNCIL OF AMERICAN-SOVIET FRIENDSHIP, WIL-
LIAM HOWARD MELISH, RICHARD MORFORD, HENRY PRATT
FAIRCHILD, JOHN A. KINGSBURY, M. WALTER PESMAN,
CORLISS LAMONT,

Petitioners,

v.

J. HOWARD McGRATH, Attorney General of the United
States; SETH W. RICHARDSON, Chairman of the Loyalty
Review Board of the United States Civil Service Com-
mission; GEORGE W. ALGER, JOHN HARLAN AMER, et al.,
etc.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit.

BRIEF FOR PETITIONERS

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On Writ of Certiorari to the United States Court of Appeals
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BRIEF FOR PETITIONERS

OPINIONS BELOW

The Court of Appeals did not file an opinion, but its order (R. 20) expressly affirmed on the authority of its previous decision of *Joint Anti-Fascist Refugee Committee v. Clark*, 177 F. (2d) 79, cert. granted, No. 556, Oct. Term, 1949. References to the rationale of the decision below will,

therefore, be to the opinion in the *Joint Anti-Fascist* case which will henceforth be so cited. The opinion of the District Court has not been reported. It appears at R. 17-19

JURISDICTION

The jurisdiction of the Court rests on 28 U. S. Code, Section 1254. The petition for a writ of certiorari was granted on May 15, 1950 (R. 23).

EXECUTIVE ORDER INVOLVED

Executive Order 9835, 12 F. R. 1935, is quoted in the Appendix hereto.

STATEMENT OF THE CASE

On June 29, 1948, the petitioners filed a complaint in the District Court for the District of Columbia seeking an injunction and declaratory judgment against the Attorney General¹ and the chairman and members of the Loyalty Review Board of the United States Civil Service Commission (hereinafter called the Board) (R. 2, 6).

No answer to the complaint was filed. Respondents filed a motion to dismiss the complaint (R. 17), which was granted (R. 19). Accordingly, the allegations of the complaint must be taken as true for present purposes.

The allegations of the complaint (R. 2-16) are summarized as follows.

Executive Order 9835 establishes an employees loyalty program in the executive branch of the federal government. Section III(3) of the Order requires the Attorney General to supply to the Board the names of organizations designated by him, after appropriate investigation and determination, as "totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny

¹ The complaint originally named Tom C. Clark, Attorney General, as a defendant. Respondent McGrath was substituted by order of the Court of Appeals (R. 21).

others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

The Board is required to communicate the Attorney General's listing to the various federal departments and agencies for use in proceedings to determine whether applicants for federal employment shall be denied employment and whether federal employees shall be dismissed on the basis that "reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States" (Ex. Order, III (3) (a), V (1)). Thus in determining this issue, the adjudicating bodies consider the employee's or applicant's "membership in, affiliation with or sympathetic association with" any organization on the Attorney General's "subversive list" (id., V(2) (f)).

In November 1947 and May 1948, the Attorney General furnished the Board a list of organizations so designated by him, and included therein the name of petitioner National Council of American-Soviet Friendship, Inc. (hereinafter called the National Council) (R. 11). The National Council had never received any advance notice that it would be so listed, and the Attorney General had not made an "appropriate investigation and determination," as required by the Executive Order, prior to listing the National Council (R. 11, 12). The National Council requested the Attorney General for the particulars on which he had based his conclusion and for a hearing at which it could refute his charges. The Attorney General refused on the grounds that such procedures were not authorized by the Executive Order (R. 12).

In December 1947 and May 1948, the Board released for publication the listing of the Attorney General, which included the name of the National Council. This listing received wide and repeated publicity throughout the country (R. 12).

The National Council is a non-profit membership corporation, whose purpose is "to strengthen friendly relations

between the United States and the Union of Soviet Socialist Republics by disseminating to the American people educational material regarding the Soviet Union, by developing cultural relations between the peoples of the two nations, and by combating anti-Soviet propaganda designed to disrupt friendly relations between the peoples of these nations and to divide the United Nations" (R. 4). It engages in numerous activities to further these purposes, including exhibition, circulation and publication of materials and literature dealing with life in the Soviet Union, maintaining a speakers' bureau, holding of public meetings, etc., many of which involve cooperation with museums, libraries, schools and other organizations (R. 6-9). It has expended large sums up to approximately \$100,000 per annum, to finance its activities, including the maintenance of a staff and office, preparation of literature and other materials, etc. (R. 9). Its revenues have been generally derived by contributions from organizations and individuals in sympathy with its objectives and largely through collections at meetings (*ibid*).

The National Council has never engaged in any conduct or activity which provides any basis for it to be designated as "totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts by force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means" (R. 10).

The Denver Council of American-Soviet Friendship, also a petitioner, is one of the affiliates of the National Council (R. 4). The individual petitioners are officers or directors of the National Council or the Denver Council (R. 4, 5).

As a result of the actions of respondents in listing and publicizing the National Council as a "subversive" organization² and in using the listing in the loyalty program, the

² We use the word "subversive" henceforth as including any or all of the categories referred to in section III(3) of Executive Order 9835—i.e., "totalitarian, fascist, communist, subversive," etc.

National Council's activities have been seriously hampered and it has suffered great pecuniary loss. Thus the National Council and its affiliates, including the Denever Council, have lost numerous members and officers, lost public support and contributions, lost attendance at meetings, lost circulation of their publications, lost acceptance by schools and organizations of their material, have been denied meeting places and radio time, and are unable to get members and support from federal employees. In addition, the listing caused the Treasury to rule publicly that contributions to the National Council and its affiliates will no longer be recognized as tax-exempt contributions to educational institutions, with the result that the National Council and its affiliates have lost large sums of money which they would otherwise have received as contributions (R. 13, 14).

Serious damage has also been caused to the individual petitioners by respondents' action. Rev. Melish's position as Assistant Rector of the Church of the Holy Trinity has been jeopardized. Morford has been hampered in the right to perform his duties and employment (from which he receives his livelihood) as chief executive of the National Council. Fairchild, Kingsbury and Lamont are lecturers, and have lost bookings and had their professional standing impaired. Pesman has lost commissions, as an architect for public bodies has had contracts cancelled, and has lost his teaching position at a university (R. 15). In addition, the individual petitioners and all members and supporters of the National Council have been hampered in their right to associate in the activities of the Council and have had their opportunities for public and private employment impaired (R. 15, 16). The reputations of petitioners have been damaged and they have been subjected to vilification and harassment (R. 12, 13).

The complaint alleged that the actions of the respondents were unconstitutional and in excess of any statutory authority (R. 13), and that Part III, section 3 and Part V, section 2

of Executive Order 9835 are unconstitutional as construed and applied by the Attorney General (*ibid*). The relief sought included a declaratory judgment to this effect and an injunction restraining the respondents from keeping in effect the listing of the National Council or taking any action on the basis thereof (R. 16).

The judgment of the District Court dismissing the complaint was affirmed by the Court of Appeals for the District of Columbia on October 25, 1949. It rendered no opinion in the case, but its order (R. 20) relied on its opinion in *Joint Anti-Fascist Refugee Committee v. Clark*, 177 F. (2d) 79. That opinion, however, was not addressed to the arguments, which are relied upon herein and which were contained in petitioners' brief filed in the Court of Appeals urging reversal of the decision of the District Court.

The *Joint Anti-Fascist* case held that a complaint for injunction seeking relief from the Attorney General's designation of an organization as "subversive" did not present a "justiciable controversy" and hence was properly dismissed. The court further briefly stated its views that the Attorney General's act was valid. 177 F. (2d) at 84.

SPECIFICATION OF ERRORS

The court below erred in affirming the judgment of the trial court because

(a) a justiciable controversy was presented by the complaint, the petitioners had standing to sue, and the complaint stated a claim upon which relief can be granted; and

(b) the actions complained of abridged petitioners' freedoms of speech and assembly in violation of the First Amendment, deprived them of liberty and property without due process of law in violation of the Fifth Amendment, and were in excess of the executive power conferred by the Constitution and in violation of the Ninth and Tenth Amendments.

ARGUMENT

I. The Complaint Presents a Justiciable Controversy, and Petitioners Have Standing to Sue.

This case challenges governmental action which has impaired the effective exercise by petitioners of their rights of speech and assembly. The court below has held that the complaint did not present a "justiciable controversy" because the impairment of these rights was accomplished not by an outright interdiction, but by the use of more insidious governmental pressures, applied to deprive petitioners of an audience of supporters, and even of a meeting place. The court below has thus held that First Amendment freedoms may not receive judicial protection so long as they are abridged by sophisticated methods.

The method which was here employed is that of the index expurgatorius and the blacklist. It consists of an authoritative determination, made in camera, that certain persons, organizations, literature, or doctrine are heretical, disloyal, "subversive," or otherwise officially obnoxious. Once the official stigmatization is published, any person who disregards its implication to boycott those listed incurs such penalties as excommunication from governmental employment and the social, economic and political sanctions which derive from public odium. These sanctions are, of course, particularly effective in a time of political tension and public hysteria.

This kind of censorship is currently in its heyday as a technic for suppressing political dissent in this country. Having been developed and applied to an extreme by the House Committee on Un-American Activities,³ it has been adopted by the executive branch in Executive Order 9835.

³ On the Committee's exercise of censorship by "exposing" to public retribution those who advocate what it determines to be "un-American" or "subversive" ideas, see Note, *Constitutional Limitations on the Un-American Activities Committee*, 47 Col. L. Rev. 416; Ogden, *The Dies Committee* (2d ed. 1945); Cushman, *Civil Liberty and Public Opinion, in Safeguarding Civil Liberty Today*; Edward L. Bernays *Lectures of 1944 given at Cornell University* (1945) 100, 101; Gellhorn, *Report on a Report of the House Committee on Un-American Activities*, 60 Harv. L. Rev. 1193.

Legal and political considerations obviously demanded that the establishment of this executive index be given an ostensible connection with a governmental function. Popular revulsion and judicial intervention would have been invited if the executive had issued a bare order which simply declared that the National Council was officially determined to be "subversive," and that all persons were required to refrain from belonging to or supporting it under the penalty of being barred from governmental employment, deprived of tax benefits, and publicly branded as disloyal.

This is exactly what the Executive Order provides, but it does so as part of a purported program to protect "the democratic processes which are the heart and sinew of the United States" by insuring that federal employees "be of complete and unswerving loyalty to the United States" and that "maximum protection . . . be afforded the United States against infiltration of disloyal persons into the ranks of its employees" (preamble, Ex. Order 9835). As will later appear, however (*infra*, pp. 31, 32), the listing of "subversive" organizations has only a fictitious connection with the purported objective of guaranteeing the fidelity of government servants; the only real effect of the listing is to infringe the civil liberties of great numbers of the American population, including the petitioners. Indeed, the deliberate avoidance of any procedure which would permit an accurate determination of which organizations are "subversive" is itself plain proof that the executive is interested not in listing "subversive" organizations, but only in listing those whom, for reasons known to himself, he dislikes and seeks to destroy.

The greatest justification for judicial review of the constitutional validity of legislative and executive action is that it preserves and gives vitality to the Bill of Rights. We have been told: "No higher duty, no more solemn responsibility rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human

being subject to our Constitution—of whatever race, creed or persuasion.” *Chambers v. Florida*, 309 U. S. 227, 241. But the Bill of Rights is not translated into living law by courts which refuse to take cognizance of infringements simply because these, though effective enough, are accomplished by subtle methods, employed in the name of security and democracy.

The fundamental constitution error of the court below is, then, that it has failed to discharge its primary obligation to give vitality to the Bill of Rights. It has refused to recognize that the freedoms of speech and protection must be judicially protected against abridgement by technologically advanced mechanisms. It has willingly allowed itself to be hoodwinked into accepting as a measure of internal security an action of the executive which erodes the liberties on which true security must rest.

A sustaining of the decision below, therefore, would imply that the courts have virtually withdrawn from the function of protecting civil liberties. For it is plain that in these times our liberties are endangered chiefly by measures which utilize technics or indirection and wrap themselves in a cloak of a purported governmental function—currently “internal security” is the fashionable garb. (Cf. *United States ex rel. Krafft v. Shaughnessy*, 338 U. S. 537). It was not to be expected that the Bill of Rights would eliminate governmental attempts at censorship. The weed is too sturdy to uproot, and its proliferation continues under ingenious concealments. This Court has stated:

The high place in which the right to speak, think, and assemble as you will was held by the Framers of the Bill of Rights and is held today by those who value liberty both as a means and an end indicates the solicitude with which we must view any assertion of personal freedoms. We must recognize, moreover, that regulation of ‘conduct’ has all too frequently been employed by public authority as a cloak to hide censorship of unpopular ideas. We have been reminded that ‘It is not often in this country that we now meet with

direct and candid efforts to stop speaking or publication as such. Moderate inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within officials control'. (*American Communications Association v. Douds*, 339 U. S. 382, 399, citing Jackson J., concurring in *Thomas v. Collins*, 323 U. S. 516, 547).

This case presents as blatant an instance as ever there was in which governmental authority seeks to censor unpopular ideas by indirect and uncandid efforts and in which it has spuriously associated speech with a factor which may be officially regulated. If courts deny jurisdiction of the controversy precisely because of the spurious association and the indirect and uncandid method, they exhibit little solicitude for assertions of personal freedoms.

The decision below, indeed, manifests not a sensitive but a callous attitude toward the right of political dissent. It is impossible to believe that the court would have exhibited a similar disinclination for intervention if the case before it had been one in which the Attorney General had listed the Catholic Church as a "subversive" organization for the purposes of the loyalty order. Nor can we believe that the court would have insisted that a listing of the Catholic Church was only a matter of internal executive housekeeping with which it could have no concern. Yet if to the lack of standards and procedures of the loyalty order is added judicial unreviewability, it is plain that the executive can readily declare religious organizations to be subversive. If political considerations today prevent him from so proscribing the Catholic Church, they may not be so effective tomorrow, and perhaps even today he could, with political safety, so list Jehovah's Witnesses or some other minor sect. The court below has failed to realize that freedom of religion, freedom of speech, and freedom of assembly are given like protection by the same Amendment (*cf. Prince v. Massachusetts*, 321 U.S. 158, 164). It has overlooked the fact that its doctrine permits executive black-

listing of organizations whose names do not contain such words as "Anti-Fascist" or "American-Soviet Friendship."

The decision below was expounded in an opinion which mixes bad logic with misread precedents. The court held that no "justiciable controversy" existed because the Executive Order and the Attorney General's listing "imposes no obligation or restraint" on the National Council, "commands nothing" of it, denies it "no authority, privilege, immunity or license," and subjects it "to no liability." Furthermore, it held, the Attorney General's list was "furnished the Board only by way of information and advice," and "cannot be put in the category of laws or regulations;" the "correctness of administrative advice cannot be reviewed by the courts," and "at most, any injury to the Committee is indirect—purely incidental to the objects and purposes of the loyalty program." (*Joint Anti-Fascist* case at 82, 83). The actions complained of, the court states, "were not aimed at the [National Council], but were necessary steps in executing the law and carrying out the loyalty program. It is not unusual for official action, intended for one purpose, to affect adversely others against whom it is not directed. But these unavoidable consequences cannot stay the hand of government. They afford no ground for judicial review." (*Id.* at 83).

The theory of the opinion is, then, that the reviewability of administrative action depends on the form of the action and not on its impact on the complainant or its plain consequences. To be reviewable, the action must in form be addressed to the complainant and must regulate him by a legalistic mechanism. If it regulates him other than by commanding action, denying a privilege, or subjecting him to liability, then it does not, so far as the courts are concerned, regulate him at all. The courts will not take into account regulation by social and economic pressures even though these are invoked and insured by the administrative action.

The court below has formulated this thesis as a rule of general jurisprudence. It did not examine the particular interests for which the complainant sought judicial protection, nor does it intimate that certain interests may be protected against infringement by action which is not "regulation" by the court's definition. On the contrary, it assumes that no interest is judicially protected against action which is not such "regulation," and it cites as precedents cases which involved interests of a different kind than those asserted in the case before it.

This approach is on its face sterile. When a person seeks relief from a court, he is asking judicial protection for a particular interest. The nature of the interest will vary from case to case. The source of the legal protection claimed for it, as whether one clause of the Constitution or another, will vary. And just as the interests and the source of protection vary, so, it is plain, will the nature and extent of the protection vary. Because certain interests are not protected against harm caused by the publication of administrative findings, it does not follow that no interest is protected against such harm. It is absurd to generalize to that effect for all interests on the basis of decisions which involved only certain interests. The only sound approach is to examine the particular interest asserted and the source and purpose of its legal protection before deciding whether or not that interest must be judicially protected against harm flowing from the publication of administrative findings.

The precedents chiefly relied on by the court below denied complainants relief from harm caused by allegedly erroneous administrative findings on the ground that such findings, even if erroneous, caused no legal injury since they were not "regulation." *Standard Computing Scale Co. v. Farrell*, 249 U.S. 571; *United States v. Los Angeles & S.L.R. Co.*, 273 U.S. 299; *Employers Group v. National War Labor Board*, 143 F. (2d) 145, cert. den. 323 U.S. 735; *National War Labor Board v. U.S. Gypsum Co.*, 145 F. (2d) 97, cert.

den. 324 U.S. 856. In these cases the complaints sought the protection of the due process clause of the Fifth or Fourteenth Amendments. The courts held that the due process clause protects only against governmental action which is at least "regulation", and that mere publication of administrative findings is not "regulation" and thus does not cause legal injury which that clause will redress. The decisions establish, and it may be granted, that the words "shall be deprived" in the due process clause extends only to action which is at least "regulation" (i.e., which commands or restrains action or creates liability) and not merely publication of findings. These cases did not and could not decide that there do not exist rights derived from sources other than the due process clause against harm caused by such publication.⁴

Where the Fourteenth Amendment is not involved, there can be rights against harm by administrative publication which is not "regulation". Thus in *Utah Fuel Co. v. National Bituminous Coal Commission*, 306 U.S. 56, the Court held that equitable relief was available if an administrative agency threatened to commit harm to common-law interests merely by publishing, in excess of statutory authority, confidential business information. The Court of Appeals of the District of Columbia has itself held to like effect in a case in which the distraction of spurious pleas of "security" was absent. *Bank of America National Trust & Savings Ass'n v. Douglas*, 105 F. (2d) 100; cf. *American Sumatra Tobacco Corp. v. SEC*, 93 F. (2d) 236. In these cases "regulation" was not a prerequisite to the availability of relief because there was involved not a deprivation of

⁴ In the *Standard Scale Co.* case, *supra*, the harm complained was loss of sales resulting from publication of an administrative report which, in setting out specifications for accurate scales, excluded the kind of scales manufactured by the plaintiff. In the *Los Angeles & S.L.E. Co.* case, *supra*, the harm complained of was the impairment of business credit by the publication of a report allegedly undervaluing the complainant's assets. Both cases involved only claims for protection under the Fourteenth Amendment. The *War Labor Board* cases, *supra*, held only that an unenforceable "directive" which creates no legal liabilities is not "deprivation" of property for due process purposes merely because it might induce the President to seize the property (an action which would be such "deprivation").

property contrary to due process but rather ultra-vires action damaging a recognized common-law interest.

In the present case, petitioners assert respondents' actions contravene the First, Fifth, Ninth and Tenth Amendments. Whether a "justiciable controversy" is presented depends on whether these Amendments afford legal protection to petitioners' interests against the harm caused thereto by the kind of administrative action here involved. To determine this question it is necessary to examine these Amendments separately, so as to ascertain how far their protection extends and what is the prerequisite for their invocation.

A. "Justiciability" and the First Amendment.

Petitioners invoke the First Amendment to protect their interests of speech, press and assembly against the respondents' actions. These interests are protected by the First Amendment not merely against "deprivation" without due process of law, but against any governmental action which restrains or interferes with ("abridges") them, whether the interference be "direct" or "indirect" and whether it be accomplished by "regulation" or by other pressure.

It is true, of course, that this Court has created exceptions to the stark, unequivocal terms of the First Amendment. As a result, the government may, under certain circumstances, abridge free speech and free assembly. From the Court's latest decision in this field, *American Communication Association v. Douds*, 339 U. S. 382, it appears that governmental abridgement of speech is permissible in two categories of cases. In the first, a direct restraint or prohibition of speech is permissible if, and only if, the "clear and present danger" test is satisfied. In the second, governmental regulation of conduct, as distinguished from measures aimed at the suppression of dangerous ideas, may indirectly "discourage" the exercise of free speech if, and only if, the social interest in the prevention of the anti-social conduct out-balances the social interest against the discouragement of the speech.

As to the validity of this view of the First Amendment, we have reservations of our own. But for present purposes, the point to be made is that neither limitation on the scope of the First Amendment goes to jurisdiction to hear and determine the controversy. The exceptions to the scope of the First Amendment establish only standards of decision, not areas of "non-justiciability."

Thus the existence of a clear and present danger of a serious, substantive evil has been used to sustain the validity of a direct restraint on speech. But it has not resulted in making the controversy "non-justiciable." Similarly, if the interference with speech is a "discouragement" indirectly stemming from the regulation of conduct, the courts, under *Doubs*, must determine the validity of the regulation by balancing the competing interests. They cannot decline jurisdiction to consider validity on the grounds that the administrative action merely indirectly discourages free speech, for then they are refusing to accept their responsibility to balance the competing interests.

What *Doubs* teaches, then, is that any governmental inhibition of speech is subject to judicial review. Whether the inhibition is a direct restraint or an indirect "discouragement" goes not to the availability of review, but to the standards to be applied in determining validity.

The decision below is thus flatly at odds with the *Doubs* case. The decision below rests on the basis that the courts may not review administrative action which only indirectly or consequentially abridges speech. But in *Doubs* the Court stated:

When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented. (at p. 399)

And the Court further stated:

The statute does not prevent or punish by criminal sanctions the making of a speech, the affiliation with any organization, or the holding of any belief. But as we have noted, the fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes. (at p. 402)

Under these passages it is plain that a court cannot refuse jurisdiction to review governmental action because it only indirectly or conditionally abridges or discourages speech. Once there is shown to be any interference with speech, a "justiciable controversy" exists, requiring the court to balance conflicting interests and to determine the coercive effect of an indirect discouragement.

Under the *Douglas* decision, then, a "justiciable controversy" is here presented because the governmental actions complained of have had a restraining effect on petitioners' exercise of their rights of speech and assembly. Whether this restraint is valid because it falls within limitations placed on the scope of the First Amendment goes to the constitutional merits, not to jurisdiction, and the question is properly deferred to that portion of our brief which deals with the merits. It is enough for the present that it be recognized that governmental action presents reviewable issues, a "justiciable controversy," simply if in fact it interferes with the exercise of speech and assembly. The jurisdiction depends not on the form of the governmental action, as whether it be "regulation" or merely "indirect discouragement," but on whether the action has an impact on speech and assembly. The latter is simply a factual question, and the facts are here established by the allegations of the complaint, which clearly and in detail alleges that the respondents' actions have seriously restricted the petitioners' exercise of speech and assembly.

This analysis is supported not only by the *Doubs* decision but also by the points on which we have previously dwelled—that the First Amendment can have no current vitality if judicial review is ousted when speech is effectively “discouraged” though not directly suppressed; that the First Amendment is available against “abridgement” of the liberties with which it is concerned, and not merely against “deprivation” of those liberties.

In the *Doubs* decision, the Court gave an illustration of indirect “discouragements” which “undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes.” The court stated: “A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature.” The Attorney General’s listing of the National Council as a “subversive” organization is in all important respects an arm-band requirement.

The wearing of an arm-band in itself causes no harm to the wearer. Indeed, people often wear arm-bands voluntarily and even proudly. The government may sometimes require its wearing without being offensive, as in the case of volunteer police, members of the military forces, or the marshals of a parade. A governmental requirement of the wearing of an armband is hurtful only when it symbolizes a governmental determination that the wearer is an obnoxious person. The wearer is thus identified to the public as one to be shunned or harmed.

The Attorney General’s listing of the National Council as a “subversive” organization, like a requirement that Jews wear arm-bands, embodies a governmental determination that the wearer is obnoxious to the government. Like an arm-band requirement, it harms the National Council by stimulating the public to shun or to harm it. If the invidious arm-band requirement is reviewable for conformity to the First Amendment, then so must be the invidious designation of organizations. For both the banding and the

designation have the same function and method—to embody governmental condemnation and to subject the condemned to the extra-legal sanctions of public disapproval.

The arm-band analogy completely exposes the hollowness of the point made below that the harm to the National Council cannot be legal injury because it stems only “indirectly” from the listing. So the wearer of the arm-band suffers only “indirectly” from the order requiring him to wear the band; the direct harm is inflicted by those who see it.

Under the reasoning of the decision below, an arm-band requirement would be reviewable because it would command the individual to do something. But to assign this as a basis for review is irrational. For obviously what is commanded does not in itself cause the injury—the weight of an arm-band is not onerous. The damage is done by the governmental branding and the public’s response thereto. And whether the brand is accomplished by arm-bands or by listing is a matter of legal indifference. If the government should post the names of all Jews in the post offices and newspapers, it would accomplish the same result as if it made them wear identifying bands. But by the logic of the decision below this difference in mechanics and the absence of any command to the Jews would make any challenge of the posting “non-justiciable,” at least if the government claimed that its posting was merely to identify Jews so as facilitate the taking of the census.

Other authorities also establish that judicial relief is available against governmental action which stimulates others to conduct which interferes with First Amendment freedoms. In *Illinois ex rel McCollum v. Bd. of Education*, 333 U.S. 203, a First Amendment interest was protected against invasion by governmental disclosure of religious non-conformity. In *Thomas v. Collins*, 323 U.S. 516, the First Amendment was applied to invalidate a disclosure of identity as a labor organizer as a prerequisite to speaking. In both these cases, the governmental action merely exposed

persons to conduct or attitudes of other persons which might have a restraining effect on the liberties of the complaining parties.

The foregoing establishes that the courts are required to review administrative action, including derogatory listing, which "indirectly" damages First Amendment freedoms by stimulating public revulsion. It is obvious that the persons who have standing to invoke such review must be those who suffer the damage by virtue of the government stigmatization. In this case, therefore, the National Council and the other petitioners have standing to sue, because it is they whose liberties have been abridged.

Their standing is not affected by the fact that the listing is part of a scheme which concerns government employees. Whatever may be the effect on government employees, the Attorney-General's listing interferes with the liberties of petitioners, and they must have standing to vindicate their own liberties. Even under the Fifth Amendment, as we shall see (*infra*, pp. 19-23), a person has standing to complain against harm caused to him by governmental action directed against another. The First Amendment, with its preferred position, must afford no less protection. Furthermore, the listing has an impact on the National Council at least as direct as that on government employees.

B. "Justiciability" and the Fifth Amendment

Petitioners invoke the Fifth Amendment to protect them against governmental deprivation of their liberties and property without procedural due process of law. The liberties of which they are deprived are liberties of speech, press, and association. The property interests of which they are deprived are the ability to use effectively and to augment the National Council's funds and other property.

For the purposes of the Fifth Amendment, unlike the First, it is necessary, as we have seen, to establish "deprivation." This term includes "regulation," but does not include administrative findings which are not "regulation".

Contrary to the holding below, the Attorney General's determination that the National Council is "subversive" is more than a mere finding and is "regulation" of which the due process clause takes notice. The listing, therefore, had to be made in accordance with procedural due process, and a "justiciable controversy" arises from the allegation that this requirement was not followed.

The cases hold that if an administrative finding or ruling fixes a status or establishes legal relationships so as to lay a foundation for future regulation, then the finding or ruling is itself a "regulation" controlled by the due process clause, even though it does not itself command or restrain action. *La Crosse Tel. Corp. v. Wisconsin Employment Relations Bd.*, 336 U.S. 18; *Columbia Broadcasting System v. United States*, 316 U.S. 407; *Waite v. Macy*, 246 U.S. 606; *Rochester Tel. Corp. v. United States*, 307 U.S. 125; *Powell v. United States*, 300 U.S. 276. Thus in the *LaCrosse Telephone* case, a state labor board's certification of an employee bargaining representative was held reviewable for validity even though the certification itself commanded no action; however, the employer's refusal to bargain with the certified representative could have subjected him to an administrative order for the unfair labor practice of refusing to bargain with a certified representative.

Where the administrative finding has such a status-determining effect, an administrative hearing is required by due process. *Shields v. Utah Idaho Central R.R. Co.*, 305 U.S. 177.

The determination here made by the Attorney General falls squarely within the status-determining principle, since it fixes the status of the National Council as a "subversive" organization for the purpose of supplying a foundation for action by agency loyalty boards, agency heads, and the Loyalty Review Board in discharging employees or refusing to employ applicants. This is, indeed, a conclusive fixing of status, since the loyalty boards and agency heads cannot, under the terms of the Executive Order, reject the Attorney General's determination as erroneous.

The situation presented is like that in the *Columbia Broadcasting* and *Waite* cases, *supra*. In the *Columbia Broadcasting* case, the FCC adopted a rule for its own future guidance in granting or denying radio station licenses. The Court held that this rule was itself a reviewable order even prior to any licensing action based thereon, since it fixed the status of future license applicants. So here the Attorney General's determination fixes a rule for the guidance of agencies and boards in granting or denying a license for federal employment. This case is, indeed, stronger, for in *Columbia Broadcasting* the ruling could have been changed in the licensing proceeding by the agency passing on license eligibility, whereas here the Attorney General's ruling cannot be changed by those passing on employment eligibility. Furthermore, the FCC ruling was, unlike the Attorney General's ruling, in general terms and did not pass on any particular radio station by name.

In *Waite v. Macy*, *supra*, the Secretary of the Treasury adopted a rule laying down tests as to what constituted impure tea. A Tea Board regularly applied this rule in determining which tea was importable and which should be excluded. The Secretary's rule was held to be an order reviewable on complaint by a tea importer even without action by the Tea Board excluding his tea. So here the Attorney General's ruling that the National Council is "impure" for purposes of proceedings relating to exclusion of persons from federal employment is a reviewable order.

Accordingly, the Attorney General's determination is a regulation and a reviewable order which must conform to due process requirements, since it establishes standards (defines status) for proceedings determining eligibility for federal employment.

The fact that this status is determined for proceedings determining eligibility of members or supporters of the National Council rather than eligibility of the National Council itself does not affect the standing of the National Council to test the determination. This is because the

determination and the action pursuant thereto have an impact on the relationship which employees or prospective employees have with the National Council and thereby regulate the Council itself. Thus, as the complaint alleges, the finding has induced government employees to abandon or desist from membership in the Council and from giving it financial support. So in *Pierce v. Society of Sisters*, 268 U.S. 510, a school was held able to test the validity of a law which directly regulated only pupils, but which had the effect of inducing pupils not to attend the complaining school. In *Truax v. Raich*, 239 U.S. 33, an employee was able to test the validity of a regulatory statute which operated against employers, but whose effect was to induce the employer to discharge the employee. In *Buchanan v. Warley*, 245 U.S. 60, a white person was able to test the validity of an ordinance prohibiting colored persons from buying his house. What is important, in other words, is not the person against whom the regulation is directly addressed, but the relationship regulated, and the various parties to that relationship have standing to test the regulation.

Even this complication is not present in the case of the individual petitioners. They, as potential government employees⁵ and as members and officers of the National Council, are directly "regulated" by the finding which creates for them the status of prima facie ineligibility for government employment on grounds of "disloyalty."

It is true that petitioners are not presently applicants for federal employment. But for them to apply would be a futile and meaningless gesture so long as there is in effect a rule which clearly would exclude them as leading spirits of the National Council. Their status is, therefore, as firm as that of the tea importer in *Waite v. Macy, supra*, who was able to challenge a rule which would have excluded his tea without waiting to have it actually excluded.

⁵ Paragraph 41 of the complaint alleges that some of the individual petitioners have in the past had government employment, and that because of their expert professional knowledge the individual petitioners had a reasonable expectancy of similar employment in the future, which had been impaired, if not destroyed, by respondents' actions. R. 15, 16.

It is apparent that the distinction between "regulation" and "mere administrative finding" may in certain cases involve niceties. In our view, this, if ever, was a case where the leaning should be toward finding "regulation." In other cases, usually the person complaining of the finding has a later opportunity to contest it by challenging the future action based upon the finding. But no such opportunity is available to the National Council precisely because the immediate impact of the future application is on individuals. What is more, under the Executive Order even those individuals have no opportunity in the administrative exclusion proceeding to attack the validity or accuracy of the Attorney General's designation.

C. "Justiciability" and Ultra-Vires Action

Petitioners seek relief from being defamed by administrative action which is in excess of governmental power and which violates a federal statute.

It is a truism that not all harm caused by unconstitutional or unauthorized administrative action is redressable. The person harmed is entitled to judicial intervention only if he shows "legal injury," that is, harm to legally protected interests.

When the validity of administrative action is challenged under the First and Fifth Amendments, there is no problem as to the source of the legally protected interests. These Amendments themselves create such interests in persons, the First creating certain protected interests in expression and assembly, and the Fifth creating certain protected interests in the procedures of regulation. Where, however, the challenge is that the administrative action is ultra-vires of the power of the Executive or of the powers of the federal government under the Tenth Amendment, the case is different. In Tenth Amendment cases, unlike First and Fifth Amendment cases, the protected interests must be found in a source other than the Tenth Amendment itself. The Tenth Amendment, in other words, is regarded not as

creating individual rights but rather as imposing duties owed to the body politic. In Tenth Amendment cases, therefore, it is not enough to show harm caused by *ultra-vires* action; the harm must be to an interest protected by some other provisions of the Constitution, by statute, or by common-law. *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118; cf. *Perkins v. Lukens Steel Co.*, 310 U.S. 113. The test as to whether the interest invaded by a Tenth Amendment violation is protected by common-law is whether the invasion was one which would be subject to legal redress if committed by a private person (i.e., "tortious").

Thus in the *TVA* case, *supra*, the plaintiff suffered damage from competition by the TVA's engaging in activities challenged as exceeding federal power under the Tenth Amendment. The Court held that since "competition between natural persons is lawful" (at 138), plaintiff had asserted no right "protected against tortious invasion" (at 137), and hence had shown no harm to a legally protected interest. The case, then, would have been otherwise if the harm resulting from *ultra-vires* action had been caused not merely by competition, but by competitive practices of a kind which are normally tortious (certain "unfair business practices"). In the *Perkins* case, *supra*, the harm suffered by plaintiff was exclusion from selling goods to the federal government unless it complied with conditions imposed by the Secretary of Labor allegedly in violation of statutory provisions. The Court held that the plaintiff had not shown legal injury. Since, generally speaking, a prospective seller has no legal redress against a private person who refuses to buy the seller's goods except on his own conditions, the Secretary's determination could not be challenged even if it violated the statute. As stated by the Court (at 129), "The contested action of the restrained officials did not invade private rights in a manner amounting to a tortious violation." The statute involved was, then, like the Tenth Amendment, regarded as creating not individual rights but only a duty to the body politic. Hence, as in Tenth Amend-

ment cases, violation of the statute was actionable only if the harm caused was tortious if committed by a private person (or was to interests created by the Constitution or some other statute). The case would have been different if the statute, like the First and Fifth Amendment, created individual rights, in which case all the plaintiff would have had to show would be a violation of the statute and harm resulting therefrom to the rights created. Thus if a statute requires an official to buy from a named individual, the latter can restrain the official from buying from others instead.

Under the *TVA* and *Perkins* cases, therefore, if appellees' actions are in excess of their constitutional authority, redress is available if those actions injure interests which by common-law, statute, or Constitution are normally given protection. So therefore, legal and equitable writs have run to redress or restrain harm to common-law rights by the unauthorized actions of government officials. *Land v. Dollar*, 330 U.S. 731; *Philadelphia Co. v. Stimson*, 223 U.S. 605; *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94. Obviously, this test is different than the theory of the decision below (properly applicable only to due process rights) that rights exist only against administrative action which is "regulation."

We leave to later discussion the question of whether respondents' actions were in fact beyond their authority. At present, we consider only whether petitioners have acquired standing to make this contention and have presented a "justiciable controversy" by showing that respondents' actions, if *ultra-vires*, harm interests which are normally protected.

Clearly they do so in two respects. First, they harm interests in free speech, press and assembly, and these are constitutionally protected.

In addition, they harm the interest in reputation which is protected by the common law against invasion by private persons and thus, as we have seen, against invasion by *ultra-vires* administrative action.

The complaint alleges that respondents have published, and are continuing to publish, the "finding" that the National Council is an organization which is "totalitarian, fascist, communist or subversive" or which has adopted "a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means." The application of such a description to an individual is clearly actionable defamation since it impugns his reputation so "as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." 3 *Restatement, Torts*, sec. 559. A statement that a person is a Communist, a Communist representative, or a Communist sympathizer has been repeatedly held to be libelous. *E.g. Spanel v. Pegler*, 160 F. (2d) 619; *Wright v. Farm Journal, Inc.*, 158 F. (2d) 197; *Grant v. Readers' Digest Association*, 151 F. (2d) 733, cert. den. 326 U.S. 797; *Mencher v. Chesley*, 297 N.Y. 94, 75 N.E. (2d) 257.

Accordingly, the individual petitioners have been injured in their interest in reputation, protected by the common-law, since the characterization of the National Council obviously impugns those who, like the petitioners, are its leading spirits and agents in the public eye.

The National Council, of course, has been even more directly defamed. A non-profit membership corporation which "depends upon the financial support of the public" suffers actionable defamation from publication of any matter "which tends to prejudice it in public estimation and thereby to interfere with the conduct of its activities." 3 *Restatement, Torts*, sec. 561(2). Accord: *N.Y. Society for Suppression of Vice v. MacFadden Publications*, 260 N.Y. 167, 183 N.E. 284. Obviously the Attorney General's designation is of such a nature. Cf. *Pullman Standard Car Mfg. Co. v. Union*, 152 F. (2d) 493, holding a corporation libeled by statements reflecting on its patriotism.

It follows from the foregoing that petitioners have legal redress for such defamation if respondents' actions were beyond their statutory or constitutional power.⁶

Here is most glaringly exposed the error of the court below in extending to all rights the doctrine that publication alone does not violate rights under the due process clause. For it is only publication and "regulation" that violate rights in reputation. This right, derived from common-law sources, is not affected by the due process clause requirement of "regulation" any more than are other common-law rights against tortious actions or breaches of contracts.

II. Respondents' Actions Are Illegal.

A. Violation of the First Amendment

The foregoing has sought to demonstrate that petitioners' complaint presents a justiciable controversy and that petitioners have standing to sue. We turn now to an examination of whether the respondents' actions are contrary to law.

From the allegations of the complaint, as well as from what all persons know to be true,⁷ it clearly appears that

⁶ Government officials are not, because of policy reasons, liable in money damages for defamatory statements made in connection with their official actions. *Spalding v. Vilas*, 161 U.S. 483. But the elimination of the remedy at law obviously does not eliminate, but fortifies, equitable relief. Cf. *Groner, C.J.*, concurring in *Glass v. Ickes*, 117 F. (2d) 273, 281; *United States v. Lovett*, 328 U.S. 303, 316.

⁷ Cf. editorial in the *Washington Post*, July 1, 1948:

From the moment that the loyalty review program was first promulgated by executive order this newspaper has condemned the absolute power conferred by it upon the Attorney General to single out voluntary associations which it advocates and not on account of any illegal or even improper acts that the Council of American-Soviet Friendship has been branded subversive by the Attorney General. To permit the Attorney General to place such a brand upon any groups for the mere advocacy of ideas is to permit him to silence all dissent.

If men may not join hands to espouse ideas which are unpopular then the constitutional guarantee of free speech and free association are mere myths. It is wholly on account of the currently unfashionable opinions which it advocates and not on account of any illegal or even improper acts that the Council of American-Soviet Friendship has been branded subversive by the Attorney General. To permit the Attorney General to place such a brand upon any groups for the mere advocacy of ideas is to permit him to silence all dissent.

the respondents' actions have wreaked untold injury on the petitioners' ability to speak, to obtain listeners, to write, to obtain readers, to assemble, and to obtain associates. This injury has been committed in the name of eliminating disloyal government employees. If the actions which have caused this injury are to be saved from the First Amendment, it must be only on the basis of the relationship of the Attorney-General's listing to the asserted objective of the executive's program to insure that government employees be loyal.

For present purposes, it is unnecessary to consider which of the limitations on the scope of the First Amendment is relevant to a consideration of the validity of the respondent's actions. For it is abundantly clear that neither can possibly be satisfied. The fact is that the listing of the National Council as a "subversive" organization has on the record not the remotest relevance to the elimination of disloyal employees.

The listing cannot and does not, therefore, remove or alleviate any clear and present danger that disloyal persons will enter or remain in the government service. If there is any such danger, the listing has nothing to do with it.

If the applicable test involves the balancing of competing interests, then there is no weight at all on one of the scales. For while the listing obviously impairs free speech, press and assembly, it contributes nothing to any effort to determine which government employees or persons seeking such employment are disloyal.

The reason why the listing of the National Council gives no assistance to the exclusion of disloyal employees is that the National Council, as shown by the uncontroverted allegations of the complaint, is completely loyal, "non-subver-

If the Attorney General can put the Council of American-Soviet Friendship outside the pale of decency by an arbitrary designation of it as disloyal, he can do the same in respect of any religious, political or social organization advocating unorthodox or unconventional beliefs. This is a power incompatible with a government of laws. It is a power irreconcilable with freedom.

sive" organization. In view of the National Council's purposes, policies, and activities, as shown by the complaint, an individual's membership in or support of the National Council cannot possibly be evidence that the individual is disloyal. As stated by Judge Edgerton, dissenting in the *Joint Anti-Fascist* case (at 86): "On the present record, appellee's ruling against appellant has no more tendency to promote the efficiency of the civil service than a similar ruling against the Republican Party or the Methodist Church would have."⁸

Since the Attorney-General's listing of the National Council in no wise serves any function in determining loyalty, there exists no possible justification for the damage to First Amendment freedoms which arises from the administrative libelling of the National Council and its members and from the inhibiting of federal employees from belonging to or "sympathetically associating with" the National Council.

Nor can this arbitrary, purposeless blacklisting of the National Council be constitutionally justified by any assertion that the blacklisting power is important to a loyalty program. For the power must still be exercised so as to satisfy the legitimate governmental interests without any unnecessary invasion of liberties. If, arguendo, the Attorney General may designate "subversive" organizations for the purpose of determining eligibility for government service, certainly he has no power to designate as disloyal or "subversive" organizations which, like the National Council, are loyal and "non-subversive." *Cf. Ex parte Endo*, 323 U.S. 283. It is incumbent upon the government in administering any employee loyalty program to employ a procedure which will accomplish its purposes without denying to others rights guaranteed by the First Amendment.

⁸ In the *Joint Anti-Fascist* case, the majority apparently considered it to be of some significance that the complaint there involved did not expressly deny that the organization fell within the "subversive" categories of the Executive Order. 177 F. (2d) at 81. The complaint in this case does contain such an express denial. R. 10.

Cf. Thornhill v. Alabama, 310 U.S. 88; *Winters v. New York*, 333 U.S. 507. As stated in *Thornhill's* case (at 105), measures which even indirectly impinge on civil liberties must be "narrowly drawn to cover the precise situation giving rise to the danger."

Instead of adopting standards and procedures addressed to the precise situation of danger, the Executive Order and the Attorney General have wilfully chosen an approach which guarantees error and injustice. The Executive Order leaves to the unfettered discretion of the Attorney General what organizations should be listed. The Attorney General's action was taken without notice or hearing, without particulars, without supporting evidence, and without the opportunity to the National Council to know the evidence against it, to cross-examine witnesses, or to present evidence on its own behalf. Further, the standards in the Executive Order, "totalitarian, fascist, communist, or subversive," are without reasonably precise meaning or content. They are not defined by the Executive Order, nor have they been defined by the Attorney General. The end result of such a procedure is that the Attorney General may list any organization which incurs his displeasure, without regard to the aims and activities of that organization, and whether the organization be loyal or disloyal. And that is exactly what he has done. The government offers no justification for such a procedure, and none can be offered. Whatever may be the need to ferret out and discharge disloyal employees, the use of such arbitrary procedures and vague standards to the damage of lawful, loyal organizations and persons in the exercise of their constitutional rights of speech, press and assembly, clearly contributes nothing toward satisfying that need.

Furthermore, the lack of any procedure and meaningful standards enables the Attorney General to establish illegal conditions upon government employment. The imposition of conditions which restrict the right of government employees to hold and express lawful beliefs and opinions on political

subjects, such as those advocated by the National Council, is a violation both of the Constitution (*United Public Workers v. Mitchell*, 330 U.S. 75, 100) and of the Hatch Act, which provides that federal employees "shall retain the right to express their opinions on all political subjects and candidates" (5 U.S.C., sec. 118i). The clandestine process of determining which organizations are to be blacklisted obviously permits the Attorney General to close the government service to those who hold lawful political opinions of which he disapproves or, for that matter, to those whose religion or color may not please him. The decision below, however, would immunize such action from judicial review. It would enable the executive to impose unconstitutional and illegal conditions for government employment and then to avoid any inquiry into his illegal acts simply by making the bare, unsubstantiated, and untrue assertion that he acted pursuant to the President's "right and . . . duty to protect and defend the government against subversive forces which seek to change or destroy it by unconstitutional means" and to "protect the civil service from disloyal and subversive elements." See *Joint Anti-Fascist* case at 84.

It is true, moreover, that the whole process of listing "subversive" organizations serves no substantial function in eliminating disloyal employees. Accordingly, for the listing as a whole, as well as for the listing of the National Council, there is no basis for rescue from the First Amendment's prohibition of abridgement of speech. As we have already pointed out, the absence of any rational procedures and standards in itself guarantees that the listing can have little value. The chances of error are at least as great as the chances that the listing is correct. But there is more direct evidence of the inutilty of the listing.

By a directive to the Loyalty Review Board, the Attorney General listed the organization determined to be "subversive." In the same directive, the Attorney General instructed the Loyalty Review Board that it is the loyalty of the individual which must be the guide; that the doctrine

of guilt by association is not to be applied; and that "membership in, affiliation with, or any sympathetic association with, any organization designated is *simply one piece of evidence which may or may not be helpful* in arriving at a conclusion as to the action which is to be taken in a particular case." 13 F.R. 9366 (emphasis supplied).

Such then is the contribution of the Attorney General's listing toward removing any clear and present danger. Such is its value to be offset against the harm caused by the listing to democratic processes. The listing supplies only "one piece of evidence which may or may not be helpful."

It is obvious that to judge an individual's loyalty on the basis of his organizational affiliations rather than on the basis of his individual actions is irrational and dangerous.⁹ Such a method of judgment constitutes the stock-in-trade of irresponsible persons who are currently causing the demoralization of the federal service and the blasting of individual reputations and careers.

B. Violation of the Fifth Amendment

We have already seen that the Attorney General's designation of the National Council as a "subversive" organization, being a status-fixing regulation, is subject to the requirements of procedural due process. Clearly these requirements were not observed. The National Council was given no notice, charges, or hearing. Its request to the Attorney General for the particulars upon which he based his judgment and for a public hearing received only the curt

⁹ The President himself now seems to hold this view, although he has not carried it to the logical conclusion of abolishing the Loyalty Order listings. The President was recently criticized for appointing as Secretary of Air a person who had been associated with an organization which the critic considered to be the wrong kind of group for a defense minister to belong to. The President's reply defended not the organization, but the appointee, who, he stated, "is better equipped to be Secretary of the Air Force than any man in the United States and that is the reason I appointed him." He added: "All this howl about organizations a fellow belongs to gives me a pain in the neck. I'd be willing to bet my right eye that you yourself and I have joined some organizations that we wish we hadn't. It hasn't hurt me any and I don't think it has hurt you any." Letter of May 29, 1950 to Clyde A. Lewis, Commander-in-Chief of the Veterans of Foreign Wars, quoted in the New York Times, June 7, 1950.

and unresponsive reply that "the Executive Order contains neither provision nor authorization for any of the procedural steps to which you have referred" (R. 12).

The Executive Order does, however, provide (Pt. III, sec. 3) that the Attorney General's designation of an organization as "subversive" shall be made only "after appropriate investigation and determination." The complaint alleges that no such investigation was made (R. 11-12), and this allegation was admitted by the government's motion to dismiss. If this phrase in the Executive Order is to be given any meaning whatsoever, it is clear that the Attorney General misplaced his reliance on the Executive Order in denying notice, hearing, and anything which gave the National Council the slightest opportunity to furnish information about itself. By such a denial, the Attorney General violated the Executive Order.

Procedural due process requires an administrative hearing prior to the administrative adjudication. *Shields v. R.R.*, 305 U. S. 177; *Morgan v. United States*, 304 U. S. 1; *Lloyd Sabauo v. Elting*, 287 U. S. 329. There must be given prior notice of the nature of the issues involved (*Morgan v. United States*, *supra*; cf. *United States v. Cruickshank*, 92 U. S. 542, 558, 559; *United States v. Cohen Grocery Co.*, 255 U. S. 81, 87, 89), as well as opportunity to examine the evidence and cross-examine witnesses (cf. *Motes v. United States*, 178 U. S. 458, 467, 471; *Kirby v. United States*, 174 U. S. 47, 55, 61; *United States v. Lovett*, 328 U. S. 313, 317), and to present evidence on one's own behalf (*Re Oliver*, 333 U. S. 257). The adjudication may not be made on the basis of evidence secretly collected and not revealed to the parties. *I.C.C. v. Louisville & N. Ry.*, 227 U. S. 88, 93; *United States v. Abilene*, 265 U. S. 274, 286, 291.

The lack of procedural due process in the establishment of the "subversive" list is augmented by the lack of standards for determination. The words "totalitarian, fascist, communist, or subversive" have no reasonably precise meaning, and the Attorney General has not defined them.

Finally, the Attorney General refuses to reveal the basis of his determination even after it is made.

No justification has been offered, nor does any exist, for this system. Besides being in total disregard of due process, it enables the Attorney General, in a boundless discretion and without necessity for accounting, to injure any organization which for any reason incurs his displeasure. In the present case, he has chosen, without particulars, without supporting evidence, and without a hearing, to brand an organization which engages only in the lawful propagation of ideas. If these practices are sanctioned, it can no longer be said that ours is "a government of laws, not of men." Frankfurter, J., in *United States v. United Mine Workers*, 330 U. S. 258, 307.

C. Violation of the Tenth Amendment.

The Constitution grants no power to any government official to list organizations as subversive or disloyal. Ours is a government of enumerated powers, and authority exercised by any of its branches must find its source in a power expressly or impliedly granted by the Constitution. *McCulloch v. Maryland*, 4 Wheat. 316; *United States v. Butler*, 297 U. S. 1; *Marshall v. Gordon*, 243 U. S. 521. The President, as well as Congress, possesses no power not derived from the Constitution. *Ex parte Richard Quirin*, 317 U. S. 1, 25, 26.

The listing of the National Council can not be rested on some implied power supplementing any authority of the executive to safeguard the efficiency and fidelity of the government service. For, as we have seen, the listing of the Council has not the remotest connection, and the listing as a whole no substantial connection, with any such safeguarding endeavor.

In the *Joint Anti-Fascist* case, the court below rested the right to designate organizations as subversive on the President's duty to execute the federal laws (Constitution, Article II, Sec. 3). But there is no law which is here being

executed. Section 9A of the Hatch Act, 5 U. S. C. sec. 118j, to which the court referred, makes ineligible for government employment members of any organization which "advocates the overthrow of our constitutional form of government in the United States." The Executive Order, however, calls for the listing of organizations other than those described by the Hatch Act.¹⁰ And this listing has no substantial relevancy to the efficiency or loyalty of government employees. Indeed, as we have already shown, the listings under the Executive Order violate another section of the Hatch Act (5 U.S.C. sec. 118i).

Furthermore, this Court has declared that no government official has power to prescribe orthodoxy of beliefs. *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 642; *Hannegan v. Esquire*, 327 U. S. 146, 158; *Thomas v. Collins*, 323 U. S. 516, 545. The Attorney General has applied the Executive Order so as to make himself a judge of political orthodoxy and loyalty and so as to inform the public that certain ideas are officially discouraged and prohibited. He has thus violated the most revered traditions of our Constitution. See Commager, *Who Is Loyal to America*, *Harvard Magazine*, Sept. 1947; De Tocqueville, II *Democracy in America*, 117 (Bradley ed. 1945); O'Brian, *Loyalty Tests and Guilt by Association*, 61 *Harv. L. Rev.* 592, 605; Emerson and Helfeld, *Loyalty Among Government Employees*, 58 *Yale L.J.* 1, 116.

CONCLUSION

Without procedural safeguards, on the basis of secret evidence locked in the bosom of an administrative officer and never susceptible of rebuttal by those affected, and without fulfilling any legitimate governmental purpose, the respondents have made an auto-da-fe for the ideas espoused

¹⁰ The difference between Hatch Act organizations and those described in the Executive Order is self-evident. It has also been expressly recognized by the Loyalty Review Board and the Attorney General (13 F.R. 9368-9369) and the Comptroller General (17 U.S. Law Week 2327, Jan. 25, 1949). The respondents have never asserted that the National Council "advocates the overthrow of our constitutional form of government."

by the National Council and its supporters. The court below has heaped fuel on the flames by decreeing that the spurious plea of "security" immunizes repression from judicial review. The actions of the respondents and the decision below are incompatible with a government of laws and a free society. The judgment below should be reversed.

Respectfully submitted,

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APPENDIX**EXECUTIVE ORDER 9835 (12 F.R. 1935)***Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government*

WHEREAS each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States; and

WHEREAS it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States; and

WHEREAS, although the loyalty of by far the overwhelming majority of all Government employees is beyond question, the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes; and

WHEREAS maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government:

Now, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U. S. C. 61i), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows:

PART I*Investigation of Applicants*

1. There shall be a loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch of the Federal Government.

a. Investigations of persons entering the competitive service shall be conducted by the Civil Service Commission, except in such cases as are covered by a special agreement between the Commission and any given department or agency.

b. Investigations of persons other than those entering the competitive service shall be conducted by the employing department or agency. Departments and agencies without investigative organizations shall utilize the investigative facilities of the Civil Service Commission.

2. The investigations of persons entering the employ of the executive branch may be conducted after any such person enters upon actual employment therein, but in any such case the appointment of such person shall be conditioned upon a favorable determination with respect to his loyalty.

a. Investigations of persons entering the competitive service shall be conducted as expeditiously as possible; provided, however, that if any such investigation is not completed within 18 months from the date on which a person enters actual employment, the condition that his employment is subject to investigation shall expire, except in a case in which the Civil Service Commission has made an initial adjudication of disloyalty and the case continues to be active by reason of an appeal, and it shall then be the responsibility of the employing department or agency to conclude such investigation and make a final determination concerning the loyalty of such person.

3. An investigation shall be made of all applicants at all available pertinent sources of information and shall include reference to:

- a. Federal Bureau of Investigation files.
- b. Civil Service Commission files.
- c. Military and naval intelligence files.
- d. The files of any other appropriate government investigation or intelligence agency.
- e. House Committee on Un-American Activities files.
- f. Local law-enforcement files at the place of residence and employment of the applicant, including municipal, county, and State law-enforcement files.
- g. Schools and colleges attended by applicant.
- h. Former employers of applicant.
- i. References given by applicant.
- j. Any other appropriate source.

4. Whenever derogatory information with respect to loyalty of an applicant is revealed a full field investigation shall be conducted. A full field investigation shall also be conducted of those applicants, or of applicants for particular positions, as may be designated by the head of the employing department or agency, such designations to be based on the determination by any such head of the best interests of national security.

PART II

Investigation of Employees

1. The head of each department and agency in the executive branch of the Government shall be personally responsible for an effective program to assure that disloyal civilian officers or employees are not retained in employment in his department or agency.

- a. He shall be responsible for prescribing and supervising the loyalty determination procedures of his department or agency, in accordance with the provisions of this order, which shall be considered as providing minimum requirements.

b. The head of a department or agency which does not have an investigative organization shall utilize the investigative facilities of the Civil Service Commission.

2. The head of each department and agency shall appoint one or more loyalty boards, each composed of not less than three representatives of the department or agency concerned, for the purpose of hearing loyalty cases arising within such department or agency and making recommendations with respect to the removal of any officer or employee of such department or agency on grounds relating to loyalty, and he shall prescribe regulations for the conduct of the proceedings before such boards.

a. An officer or employee who is charged with being disloyal shall have a right to an administrative hearing before a loyalty board in the employing department or agency. He may appear before such board personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf, through witnesses or by affidavit.

b. The officer or employee shall be served with a written notice of such hearing in sufficient time, and shall be informed therein of the nature of the charges against him in sufficient detail, so that he will be enabled to prepare his defense. The charges shall be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit, and the officer or employee shall be informed in the notice (1) of his right to reply to such charges in writing within a specified reasonable period of time, (2) of his right to an administrative hearing on such charges before a loyalty board, and (3) of his right to appear before such board personally, to be accompanied by counsel or representative of his own choosing, and to present evidence on his behalf, through witness or by affidavit.

3. A recommendation of removal by a loyalty board shall be subject to appeal by the officer or employee affected, prior to his removal, to the head of the employing depart-

ment or agency or to such person or persons as may be designated by such head, under such regulations as may be prescribed by him, and the decision of the department or agency concerned shall be subject to appeal to the Civil Service Commission's Loyalty Review Board, hereinafter provided for, for an advisory recommendation.

4. The rights of hearing, notice thereof, and appeal therefrom shall be accorded to every officer or employee prior to his removal on grounds of disloyalty, irrespective of tenure, or of manner, method, or nature of appointment, but the head of the employing department or agency may suspend any officer or employee at any time pending a determination with respect to loyalty.

5. The loyalty boards of the various departments and agencies shall furnish to the Loyalty Review Board, hereinafter provided for, such reports as may be requested concerning the operation of the loyalty program in any such department or agency.

PART III

Responsibilities of Civil Service Commission

1. There shall be established in the Civil Service Commission a Loyalty Review Board of not less than three impartial persons, the members of which shall be officers or employees of the Commission.

a. The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned.

b. The Board shall make rules and regulations, not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty.

c. The Loyalty Review Board shall also:

- (1) Advise all departments and agencies on all problems relating to employee loyalty.
- (2) Disseminate information pertinent to employee loyalty programs.
- (3) Coordinate the employee loyalty policies and procedures of the several departments and agencies.
- (4) Make reports and submit recommendations to the Civil Service Commission for transmission to the President from time to time as may be necessary to the maintenance of the employee loyalty program.

2. There shall also be established and maintained in the Civil Service Commission a central master index covering all persons on whom loyalty investigations have been made by any department or agency since September 1, 1939. Such master index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted a loyalty investigation concerning the person involved.

a. All executive departments and agencies are directed to furnish to the Civil Service Commission all information appropriate for the establishment and maintenance of the central master index.

b. The reports and other investigative material and information developed by the investigating department or agency shall be retained by such department or agency in each case.

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive,

or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alert the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

PART IV

Security Measures in Investigations

1. At the request of the head of any department or agency of the executive branch an investigative agency shall make available to such head, personally, all investigative material and information collected by the investigative agency concerning any employee or prospective employee of the requesting department or agency, or shall make such material and information available to any officer or officers designated by such head and approved by the investigative agency.

2. Notwithstanding the foregoing requirement, however, the investigative agency may refuse to disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them, and provided it advises the requesting department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not be revealed. Investigative agencies shall not use this discretion to decline to reveal sources of information where such action is not essential.

3. Each department and agency of the executive branch should develop and maintain, for the collection and analysis of information relating to the loyalty of its employees and prospective employees, a staff specially trained in security techniques, and an effective security control system for pro-

protecting such information generally and for protecting confidential sources of such information particularly.

PART V

Standards

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States.

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States;

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totali-

tarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

PART VI

Miscellaneous

1. Each department and agency of the executive branch, to the extent that it has not already done so, shall submit, to the Federal Bureau of Investigation of the Department of Justice, either directly or through the Civil Service Commission, the names (and such other necessary identifying material as the Federal Bureau of Investigation may require) of all of its incumbent employees.

a. The Federal Bureau of Investigation shall check such names against its records of persons concerning whom there is substantial evidence of being within the purview of paragraph 2 of Part V hereof, and shall notify each department and agency of such information.

b. Upon receipt of the above-mentioned information from the Federal Bureau of Investigation, each department and agency shall make, or cause to be made by the Civil Service Commission, such investigation of those employees as the head of the department or agency shall deem advisable.

2. The Security Advisory Board of the State-War-Navy Coordinating Committee shall draft rules applicable to the handling and transmission of confidential documents and other documents and information which should not be publicly disclosed, and upon approval by the President such rules shall constitute the minimum standards for the handling and transmission of such documents and information, and shall be applicable to all departments and agencies of the executive branch.

3. The provisions of this order shall not be applicable to persons summarily removed under the provisions of section 3 of the act of December 17, 1942, 56 Stat. 1053, of the act of July 5, 1946, 60 Stat. 453, or of any other statute conferring the power of summary removal.

4. The Secretary of War and the Secretary of the Navy, and the Secretary of the Treasury with respect to the Coast Guard, are hereby directed to continue to enforce and maintain the highest standards of loyalty within the armed services, pursuant to the applicable statutes, the Articles of War, and the Articles for the Government of the Navy.

5. This order shall be effective immediately, but compliance with such of its provisions as require the expenditure of funds shall be deferred pending the appropriation of such funds.

6. Executive Order No. 9300 of February 5, 1943, is hereby revoked.

HARRY S. TRUMAN

THE WHITE HOUSE,
March 21, 1947.

